

Affirmative Confusion: A Proposed Paradigm Shift in Higher Education Disciplinary Proceedings

Kendal Poirier

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Affirmative Confusion: A Proposed Paradigm Shift in Higher Education Disciplinary Proceedings

Kendal Poirier

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ABSTRACT

This Note examines the codification of affirmative consent statutes in New York and California as well as the language of Title IX of Education Amendments of 1972, with the ultimate goal of demonstrating that the two statutory constructions cannot co-exist without jeopardizing accused students' due process rights. During the course of a college or university disciplinary proceeding in an affirmative consent jurisdiction, the potential exists for a burden shift onto the accused student to affirmatively prove consent was obtained. Such a shift directly conflicts with Title IX mandates for prompt and equitable treatment. This Note proposes that in order to mitigate any confusion created by the aforementioned conflict between affirmative consent statutes and Title IX, a policy shift in college and university disciplinary proceedings is necessary. Rather than require an accused student to face a panel of peers and administrators in a hearing forum designed to decide the student's responsibility, this Note proposes an investigatory model as a more appropriate format for adjudicating sexual assault cases on college campuses. The investigatory model allows colleges and universities to conduct comprehensive interviews and investigations in a less contentious, less formal setting, allowing schools to gather and contest necessary facts to make an informed decision on responsibility and sanctions, while more effectively honoring accused students' due process rights.

AUTHOR NOTE

Kendal Poirier earned her B.A. in 2012 from Saint Michael's College and expects to receive her J.D. from the University of Massachusetts School of Law in 2017. The author would like to first and foremost thank Holly Galvin for her never-ending love and listening ear, not just during the arduous note-writing process, but from the very beginning of this law school journey. The author also owes almost everything to her parents Mark and Clare, who have offered every kind of support and an endless supply of encouragement and prepared meals. Many thanks to Professor Margaret Drew for being a guiding light from the first total thesis revision to the final product, and to Mary Beckwith, who not only provided essential resources but also an opportunity for the author to gain essential experience in this field while developing a true passion. Finally, the author wishes to thank her beloved SVU co-workers, who

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PREFACE

The purpose of this Note is to meaningfully discuss the conflict between affirmative consent statutes and the requirements mandated by Title IX for institutions of higher education adjudicating sexual assault cases between students, while focusing on the threats to accused students' due process rights this conflict creates. The author wishes to preface this Note with the assertion that this Note, while focusing predominantly on the effect affirmative consent has on the rights of the accused student, in no way invalidates the serious problem of sexual assault on college campuses. Sexual assault remains a complex and sensitive issue and the author does not aim to minimize the suffering of those students who have been victimized, nor does the author suggest that victims' rights are any less important than those of accused students. The author asks, however, that the reader understand that the scope of this Note is focused on the rights of accused students and that the reader keep an open mind when considering the argument that accused students' rights are an essential part of the equation when dealing with sexual assault on college campuses.

INTRODUCTION

The year is 2014. President Obama stands in the East Room of the White House and announces the "It's On Us" campaign, a nationwide initiative to raise awareness and encourage young people to become more involved in preventing sexual assault on college campuses.¹ Ten days later, California becomes the first state in the nation to sign into law a bill colloquially titled "Yes Means Yes," requiring public colleges and universities to implement a sexual assault policy where affirmative consent must be obtained throughout an entire sexual encounter.² President Obama's initiative and California's new law come at a time when the national spotlight shines

¹ Michael D. Shear and Elena Schneider, *Obama Unveils Push for Young People to Do More Against Campus Assaults*, N.Y. TIMES (Sept. 19, 2014, 6:34 PM), <http://www.nytimes.com/2014/09/20/us/politics/obama-campaign-college-sexual-assaults.html> [https://perma.cc/SNT6-EEBY].

² Bill Chappell, *California Enacts 'Yes Means Yes' Law, Defining Sexual Consent*, NPR.ORG (Sept. 29, 2014, 12:27 PM), <http://www.npr.org/sections/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent> [https://perma.cc/D3AZ-GLPR].

hot and bright on college campuses in the wake of several highly publicized sexual assault cases.³ In the summer of 2015, New York followed California's lead by passing its own affirmative consent statute, which extends not only to public colleges and universities, but to private institutions as well.⁴ At the time of this writing, there are fourteen states with proposed affirmative consent statutes moving through their legislatures.⁵ Victims' rights advocates champion these new pieces of legislation.⁶ Meanwhile, lost in the shuffle of national publicity and groundbreaking legislation is the accused student.

As affirmative consent statutes gain prevalence in college sexual assault policies, Title IX of the Education Amendments of 1972 (Title IX) has been increasingly invoked in holding college and university administrations accountable with regard to sexual assault.⁷ Generally, Title IX prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.⁸ In 2011, the United States Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague Letter" (the Letter) to address issues of sexual assault on college campuses.⁹ The Letter established that sexual violence such as rape falls under the Title IX definition of sexual harassment, which schools are required to address.¹⁰ The OCR also outlined a series of steps in the Letter that schools must take in order to fairly and equitably investigate and adjudicate allegations of sexual assault on their campuses.¹¹

³ Shear & Schneider, *supra* note 1.

⁴ Susanne Craig and Jesse McKinley, *New York's Lawmakers Agree on Campus Sexual Assault Laws*, N.Y. TIMES (June 16, 2015, 2:30 PM), <http://www.nytimes.com/2015/06/17/nyregion/new-yorks-lawmakers-agree-on-campus-sexual-assault-laws.html> [<https://perma.cc/S764-6XUQ>].

⁵ *See generally Affirmative Consent Laws (Yes Means Yes) State By State*, AFFIRMATIVECONSENT.COM (Nov. 15, 2015, 10:05 AM), <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/?hvid=3aRofN> [<https://perma.cc/92WV-3SD3>].

⁶ *See* Chappell, *supra* note 2.

⁷ Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleagues (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/8LYN-HLAH>].

⁸ 20 U.S.C. § 1681(a) (2012).

⁹ Ali, *supra* note 7.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 9.

While Title IX is intended to promote equity and fairness when addressing sexual assault allegations,¹² the introduction of affirmative consent statutes creates confusion and conflict in the university disciplinary arena under these equitable standards. By requiring an accused student to prove affirmative consent was obtained in order to rebut a presumption that consent was *not* obtained, and thus a sexual assault occurred, accused students' due process rights are endangered as schools attempt to comply simultaneously with both Title IX and their state's affirmative consent statute.

Tellingly, not even the representative who drafted California's affirmative consent legislation can concretely articulate how such cases are to be adjudicated. When asked how an accused person is to prove he or she received consent, California Representative Bonnie Lowenthal, co-author of the state's affirmative consent bill, responded "your guess is as good as mine. I think it's a legal issue. Like any legal issue, that goes to the court."¹³

The purpose of this Note is to examine and critique California and New York's affirmative consent statutes, as well as the language of Title IX, with the ultimate goal of demonstrating that the two statutory constructions cannot co-exist without seriously jeopardizing students' due process rights. Part I of this Note will provide the necessary background on the development and implementation of the codification of affirmative consent into law, and review both the history of Title IX as a civil rights statute and its evolution as an instrument in responding to sexual assaults on college campuses.

Part II of this Note will examine the shifting burden of proof onto the accused student to affirmatively prove that he or she obtained affirmative consent as the nexus at which these two laws conflict. While affirmative consent requires an accused student to make a showing of proof to rebut an accusation,¹⁴ Title IX requires "prompt and equitable" treatment of cases involving sexual assault.¹⁵ The codification of affirmative consent as a statute creates a conflict with

¹² 20 U.S.C. § 1681 (2015).

¹³ Josh Dulaney, *Students Question 'Affirmative Consent' Bill Designed to Combat Sexual Assaults*, SAN GABRIEL VALLEY TRIB. (June 8, 2014, 5:40 PM), <http://www.sgvtribune.com/government-and-politics/20140608/students-question-affirmative-consent-bill-designed-to-combat-sexual-assaults> [https://perma.cc/CGP9-WYED].

¹⁴ CAL. EDUC. CODE § 67386 (2014).

¹⁵ Ali, *supra* note 7, at 8.

Title IX, thereby increasing the risk of violations to students' due process rights.

Part III offers a brief statistical overview of the prevalence of sexual assaults on college campuses in order to illustrate the nature of the problem that college and university administrators face when writing their student conduct policies. Part III will further serve to illustrate the procedural due process landscape of a college or university's disciplinary proceeding, delineating how those due process rights typically manifest themselves in disciplinary settings. In these proceedings, the student typically faces a panel of peers and administrators who will make a ruling on the student's conduct and sanction the student accordingly.

Finally, Part IV of this Note will suggest the best method for mitigating the confusion created by the conflict between affirmative consent statutes and Title IX, thus protecting accused students' due process rights. Part IV will argue for a policy shift from a hearing to an investigatory model, allowing colleges and universities to conduct disciplinary investigations and proceedings in a less contentious and formal setting while still honoring the due process rights granted to accused students.

PART I: BACKGROUND

A. Affirmative Consent

In 2014, California became the first state in the nation to pass an affirmative consent statute into law, a bill now known as the "Yes Means Yes" statute. Upon its passage, lawmakers explained the intent of the bill was to create safer learning environments for students and set in place "universal" policies for adjudicating complaints of sexual assault to ensure consistency and fairness.¹⁶ The California bill requires all California state schools to adopt an affirmative consent standard with regard to sexual assault, domestic violence, dating violence and stalking in order to receive state funds for student financial assistance.¹⁷ That standard is described as "affirmative,

¹⁶ Christina Rudolph, *California Senate Bill 967 Does Not Make Everyone a Rapist: Proposed Guidelines for Analyzing its Ambiguities*, 36 U. LA VERNE L. REV. 299, 300 (2015).

¹⁷ CAL. EDUC. CODE § 67386 (2014).

conscious, and voluntary agreement” to engage in sexual activity.¹⁸ “It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others engaged in sexual activity.”¹⁹ However, the statute also instructs it will not be considered a valid excuse that the accused student’s belief in affirmative consent arose from the intoxication of the accused.²⁰ On the other hand, if the complainant is incapacitated due to the influence of drugs or alcohol, consent cannot be given.²¹ The statute goes on to state that “lack of protest or resistance does not mean consent, nor does silence mean consent.”²² According to California’s statute, “affirmative consent must be ongoing throughout the sexual encounter and can be revoked at any time.”²³

New York’s statute outlines a similar standard, defining consent as a knowing, voluntary and mutual decision among all participants to engage in sexual activity.²⁴ Consent can be given by words or actions, provided those words or actions create clear permission regarding the participants’ willingness to engage in the sexual activity.²⁵ Silence or lack of resistance does not meet the standard for consent.²⁶ Further, consent is required regardless of whether the initiating party is under the influence of drugs and/or alcohol.²⁷

One major difference between the New York and California laws is that New York’s law also extends to private institutions.²⁸ Thus, both California and New York have enacted sweeping legislation requiring all state institutions of higher education (in New York, private institutions as well) to write affirmative consent into their sexual assault policies or risk losing state funding.²⁹

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ N.Y. EDUC. LAW § 6441 (McKinney 2015).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; CAL. EDUC. CODE § 67386 (2014).

One concrete illustration of an affirmative consent statute can be found in the State University of New York (SUNY) system, which has implemented drastic changes to their sexual assault policies to conform to the statutory mandates required by affirmative consent as well as create a uniform policy statewide.³⁰ A Title IX administrator with heavy involvement in re-writing the sexual assault policies indicates that while the opportunity has not yet arisen to compare data from this year and the previous year,³¹ students have received extensive education on the changing policies and certain SUNY schools have seen an increase in sexual assault reports.³² This same Title IX administrator indicates that some schools struggle with the application of the ambiguous language of the statute when both parties are intoxicated, as the policy reads, “consent is required, regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.”³³ As universities such as the SUNY system continue to grapple with the integration of the affirmative consent statutory mandate into their student conduct policies, Title IX remains a fixture in the adjudication of campus sexual assault disputes.

B. Title IX

Title IX of the Education Amendments of 1972 (Title IX) far precedes the enactment of affirmative consent statutes. Title IX mandates “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁴ The United States Department for Education (the Department) has issued a number of documents providing guidance for institutions of higher learning to

³⁰ Interview with Jane Doe, a Title IX Administrator, SUNY (Nov. 2, 2015) (redacted transcript in the author’s possession available upon request) (All school administrators have asked to remain anonymous; therefore, no identifying information will be further provided in this article beyond what the administrator has permitted).

³¹ *Id.* Data from these two years cannot be compared due to the novelty of the statute and the resulting unavailability of data.

³² *Id.* The interviewee views this increased reporting as a positive change, as students appear to be showing confidence in the new policy.

³³ *Id.*

³⁴ 20 U.S.C. § 1681 (2012).

ensure compliance with Title IX.³⁵ In 2001, the Department issued a guidance document reiterating the legal principal that sexual harassment is a form of sexual discrimination prohibited by Title IX.³⁶ Two landmark Supreme Court cases have further defined the Title IX standard. The first, *Gebser v. Lago Vista Independent School District*, held that “a school may be liable for monetary damages if a teacher sexually harasses a student, the institution has actual knowledge of the harassment, and is deliberately indifferent in responding to the harassment.”³⁷ The second, *Davis v. Monroe County Board of Education*, held that “a school may also be liable for monetary damages if one student sexually harasses another student in the school’s program and the conditions of *Gebser* are met.”³⁸ However, in its 2001 guidance document, the Department explicitly distinguished between a school’s liability standards established by those cases³⁹ and the power of federal agencies to enforce requirements that “effectuate Title IX’s nondiscrimination mandate.”⁴⁰

In 2011, the Department followed its 2001 guidance document with a “Dear Colleague Letter” intended to provide further guidance to institutions of higher learning with Title IX compliance.⁴¹ The Letter reiterated that sexual violence is a form of sexual harassment covered under Title IX.⁴² Such forms of sexual violence include rape, sexual assault, sexual battery, and sexual coercion.⁴³ The Letter also indicated that its purpose was to provide policy guidance to colleges and universities so that these institutions will remain in compliance with

³⁵ U.S. DEP’T. OF EDUC., *Sex Discrimination: Policy Guidance*, <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> [<https://perma.cc/A457-LL3A>] (last visited Oct. 19, 2015).

³⁶ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, TIT. IX (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/JR2V-8JQW>].

³⁷ *Id.* at i-ii.

³⁸ *Id.* at ii.

³⁹ *Id.* at iii. Liability is limited to private actions for monetary damages.

⁴⁰ *Id.* at ii (citing *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998)).

⁴¹ See Dear Colleague, *supra* note 8.

⁴² *Id.* at 1-2.

⁴³ *Id.*

Title IX.⁴⁴ The guidelines established by the Letter include the assertion that Title IX investigations of sexual assault allegations must be prompt, thorough and impartial.⁴⁵ A school is also required to adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination.⁴⁶ The Letter explains that an investigating body, when determining whether a grievance procedure is prompt and equitable, will examine several elements.⁴⁷ These include: notice to students of the grievance procedures, including where complaints may be filed; adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence; and notice to parties of the outcome of the complaint.⁴⁸ While this list is instructive, the Letter asserts that it is not exhaustive, as grievance procedures will vary in detail, specificity and components.⁴⁹ Ultimately, the Letter seeks to impress upon schools that failure to voluntarily comply with the guidelines set forth in the Letter may result in the OCR⁵⁰ initiating proceedings to withdraw federal funding or referring the case to the U.S. Department of Justice for litigation.⁵¹

To offer additional guidance to schools on compliance procedures with Title IX, the Department of Education issued a further guiding document entitled *Questions and Answers on Title IX and Sexual Violence* in 2014.⁵² While a disciplinary hearing is not required, the designated Title IX coordinator remains responsible for examining the disciplinary process in order to ensure compliance with Title IX's prompt and equitable requirements.⁵³ Further, a school is required to

⁴⁴ *Id.*

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 6 (citing 34 C.F.R. § 106.8(b)).

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ OCR is the enforcing agency of the Department of Education. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, *About OCR*, (Jan. 27, 2015) <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/CBX4-7P2Z>].

⁵¹ Ali, *supra* note 7, at 16.

⁵² U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/85WE-XKP9>].

⁵³ *Id.* at 25.

give the complainant any rights that it gives the accused student during the investigation and during any subsequent disciplinary proceeding.⁵⁴

PART II: THE CONFLICT BETWEEN AFFIRMATIVE CONSENT STATUTES AND TITLE IX CREATES A THREAT TO DUE PROCESS

A. Affirmative Consent Imposes Inequitable Presumptions and Standards

The statutory language of affirmative consent indicates “it is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity.”⁵⁵ However, conspicuously absent from the statute is clear instruction on how an accused student should proceed in proving that they in fact obtained affirmative consent.⁵⁶ Even more troubling is the requirement that the accused “take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.”⁵⁷ In light of this ambiguous language, where silence nor lack of protest or resistance does not mean consent,⁵⁸ the burden arguably shifts to the accused student to prove that he or she obtained consent and took reasonable steps to obtain it throughout the sexual encounter. Supporters of affirmative consent statutes argue that the responsibility to ensure consent during sex is typical of behaviors exhibited during consensual sexual encounters.⁵⁹ However, when the question of consent moves out of the bedroom and into a university disciplinary proceeding, an accused student is arguably placed in a position to prove that consent was obtained to rebut the presumption that consent was not obtained.

In August of 2015, a trial court in Tennessee issued a ruling that supports the argument that accused students are placed in an unfair position during university disciplinary proceedings where affirmative consent is the policy standard. In *Mock v. University of Tennessee at*

⁵⁴ *Id.* at 26.

⁵⁵ CAL. EDUC. CODE § 67386 (a)(1) (2014).

⁵⁶ *See id.*

⁵⁷ CAL. EDUC. CODE § 67386 (a)(2)(B) (2014).

⁵⁸ *Id.*

⁵⁹ *See Rudolph, supra* note 16, at 301.

Chattanooga, the court held that the burden of proof was improperly shifted and imposed an untenable standard upon the accused student to disprove the accusation that he forcibly assaulted the complainant.⁶⁰ In *Mock*, an Administrative Law Judge (ALJ) found the accused student (Mock) responsible for violating University Code of Conduct, Section 7 and ordered his dismissal from the University.⁶¹ Mock appealed the decision to the University Chancellor, and a hearing was conducted in which both sides, including the complainant, argued their respective positions.⁶² The Chancellor upheld the ruling and ordered Mock's expulsion.⁶³ Mock argued on appeal that the University Chancellor shifted the burden of proof from the University and placed it upon Mock, removing the requirement that the University prove a lack of consent or inability to consent.⁶⁴ Mock further argued that, as a consequence of this burden shift, the University Chancellor found Mock "violated the affirmative consent standard, essentially formalizing a presumption of guilt and requiring Mr. Mock to prove his innocence as an affirmative defense."⁶⁵

⁶⁰ *Mock v. Univ. of Tenn.*, No. 14-1687-II (Ch. Ct. of Davidson Cnty. Tenn., Aug. 4, 2015).

⁶¹ *Id.* at 2 (The administrative judge made the following findings of fact: Mock and the complainant were known to each other before the alleged sexual assault, which took place at a party. Both Mock and the complainant had been drinking. The complainant alleges that at some point during the evening, she consumed something that affected her memory, making her feel as if she were in "a fog." The complainant became sick from the alcohol and sometime later Mock discovered her on the bathroom floor. They moved into an adjacent bedroom, where they engaged in sexual intercourse. The ALJ made a preliminary credibility determination of the complainant, whereby the complainant's "own testimony did not convince the hearing officer that she was intoxicated in order to prove that Mock knew or should have known that her ability to consent was seriously compromised." However, following the university's petition for reconsideration, the ALJ made no changes to her findings of fact but reversed her Initial Order by changing her conclusions and held that the university proved by a preponderance of the evidence that the complainant never consented to sexual activity). Author's note: We can infer, based on the ALJ's determinations of the complainant's testimony that the complainant testified at the initial hearing.

⁶² *Id.* at 3.

⁶³ *Id.*

⁶⁴ *Id.* at 6.

⁶⁵ *Id.*

The Chancery Court in the *Mock* case ultimately held that Mock's expulsion was "arbitrary and capricious" and a violation of Mock's due process rights when the University improperly interpreted the Student Conduct Code and unfairly shifted the burden from the charging party (the University), to the charged student (Mock).⁶⁶ The University took the position that it satisfied its burden of proof to show that no affirmative consent was obtained by requiring the charged student to affirmatively prove consent⁶⁷ and the Chancery Court found this shift to be "flawed and untenable if due process is to be afforded the accused."⁶⁸ The Court further opined that, under the University's flawed standard, the accused student

Must come forward with proof of an affirmative verbal response that is credibly in an environment in which there are seldom, if any, witnesses to an activity which requires exposing each party's most private body parts. Absent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party's consent strains credulity and is illusory.⁶⁹

The *Mock* case does not hold legal precedent in other states, nor does Tennessee have an affirmative consent statute requiring all public colleges and universities to develop an affirmative consent standard for their sexual assault policies. The case is based on a unique set of facts and law requiring a university in Tennessee to produce evidence proving that a student violated the student code of conduct. One commentator observes that such legalisms as "burden of proof" have no place in campus disciplinary proceedings,⁷⁰ and there is a concerted danger in applying such terms to disciplinary hearings that closely resemble legal proceedings, but are in fact civil proceedings with much lower standards of evidence and proof than criminal legal proceedings.⁷¹

⁶⁶ *Id.* at 23.

⁶⁷ *Id.* at 11.

⁶⁸ *Id.*

⁶⁹ *Id.* at 12.

⁷⁰ Brett A. Sokolow & Daniel C. Swinton, *Corey Mock v. The University of Tennessee, Chattanooga*, THE NCHERM GROUP, LLC (2015), <http://www.boysmeneducation.com/wp-content/uploads/2015/08/NCHERMs-response-to-Corey-Mock-v.-the-University-of-Tennessee-Chattanooga.pdf> [<https://perma.cc/4793-GAXM>].

⁷¹ *Id.*

Nonetheless, the court's reasoning on the issue of consent in the *Mock* case compellingly illustrates the difficulties colleges and universities may encounter when attempting to apply an affirmative consent standard in a hearing forum that is akin to a legal proceeding, but does not conform to the high burdens and strict rules of a courtroom. Further, the *Mock* ruling is illustrative of the inequitable environment that can exist when a school unfairly imposes a burden of production on a student to prove they obtained affirmative consent, lest the presumption that consent was not obtained stands and the student is found responsible for a violation of sexual assault policy.⁷²

⁷² A further possible cause for confusion that may arise as a result of the standard created by the language of New York and California's affirmative consent laws can be found in the statutory clauses attempting to define when consent may or may not be valid due to intoxication by either party. Both New York and California statutes contain clauses that mandate it will not be a valid excuse for an accused student to allege a lack of affirmative consent if the accused student's belief in the affirmative consent arose from the intoxication of the accused. However, juxtaposed with this clause is a second clause that allows the opposite for the complainant. Both statutes require that a complainant cannot give consent if that person is incapacitated due to drugs or alcohol, and thus cannot knowingly give consent. However, the statute fails to provide a standard for which colleges and universities are to draw a line between intoxication and incapacitation to the point where the complainant can no longer consent. Therefore, while the accused student may not use his or her level of intoxication as a factor to aid a disciplinary adjudicator in determining whether affirmative consent was obtained or not, the complainant may use his or her level of intoxication to argue that they were impaired to a degree that invalidates any consent they may have given. Where the statute does not give guidance on the line between mere intoxication and impairment however, the statutory language arguably creates an inequitable standard for accused students, which would appear to be in conflict with the mandates of Title IX. Courts have generally held that voluntary intoxication is not a valid defense to general intent crimes. See Chad J. Layton, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535 (1997). However, some jurisdictions allow a defendant to form a voluntary intoxication defense to specific intent crimes, which may include sexual crimes. See *Carter v. State*, 408 N.E.2d 790 (1980) (holding that the charge of assault and battery with the intent to satisfy sexual desires was a specific intent crime and thus the defense of voluntary intoxication was available to the defendant); see also *State v. Brown*, 244 P.3d 267 (2011) (holding that the charge of aggravated indecent liberties was a specific intent crime and thus the defense of voluntary intoxication was available to the defendant). Given that criminal jurisprudence is undecided on the use of intoxication as a defense, depending upon the jurisdiction, such language arguably has no place in a statute governing university disciplinary proceedings, where legal procedures hold no weight. Such language may only

B. While Title IX requires equitable treatment

Juxtaposed against the affirmative consent statutes requiring colleges and universities in New York and California to adopt affirmative consent into their sexual assault policies is the federal statutory mandate of Title IX, which prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.⁷³ In order for a school to be compliant with Title IX, the school's sex discrimination grievance procedures must be adequate, reliable, impartial and prompt.⁷⁴ While an investigation may include a hearing to determine whether the conduct occurred, Title IX does not necessarily require a hearing.⁷⁵ However, the Dear Colleague Letter acknowledges that schools will generally employ hearings in conjunction with their investigations to determine whether sexual harassment or violence occurred.⁷⁶ The Letter further provides that in order to comport with equitable grievance procedure requirements so as not to violate Title IX, schools are required to use a preponderance of the evidence standard, and afford the parties equal opportunity to present relevant witnesses and other evidence.⁷⁷ The *Mock* court's decision arguably illustrates an inequity in the university disciplinary system that conflicts with the equitable and impartial requirements of Title IX.⁷⁸ If an accused student is required to make a showing that affirmative consent was in fact obtained, the disciplinary process is no longer impartial and no longer equitable. As a result, students' due process rights are threatened in an environment where colleges and universities are attempting to comply with both a statutory mandate for affirmative consent and the gender-balancing mandate of Title IX.

increase confusion for schools attempting to enforce these policies and conform to an affirmative consent statute while at the same time attempting to afford both parties equal rights under Title IX mandates.

⁷³ 20 U.S.C. § 1681.

⁷⁴ *Questions and Answers on Title IX and Sexual Violence*, *supra* note 52, at 25.

⁷⁵ *Id.*

⁷⁶ Ali, *supra* note 7, at 10.

⁷⁷ *Id.*

⁷⁸ See *Mock v. Univ. of Tenn.*, No. 14-1687-II 1, 20 (Ch. Ct. of Davidson Cnty. Tenn., Aug. 4, 2015).

C. The Threat to Due Process Created by This Conflict

Due process has long been a highly contested issue on public college campuses. The Supreme Court has offered little guidance on the procedural and substantive due process rights afforded students at colleges and universities.⁷⁹ Procedurally, the Supreme Court has held that, at a minimum, a student has the right to effective notice and an informal hearing permitting the student to give his version of events.⁸⁰ This aligns with the basic language of the Fourteenth Amendment, which requires that “deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”⁸¹ The Supreme Court further acknowledges that longer suspensions or expulsions for the remainder of a school term, or permanently, may require more formal procedures.⁸² However, the Court refrains from making a determination on a basic formula for a hearing that students may be entitled to under the due process clause.⁸³ Beyond notice and the right to some type of hearing, the Supreme Court made no further ruling on any other rights to which a student may be entitled in a college disciplinary hearing.⁸⁴ Substantively, a student is afforded a due process protection against arbitrary dismissals.⁸⁵ Further, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement.⁸⁶

The conflicts created by inconsistencies between affirmative consent statutes and Title IX provisions create an environment where colleges and universities increasingly run the risk of violating accused students’ due process rights. The *Mock* court’s decision illustrates an application of the substantive due process violation that can occur when affirmative consent is utilized in a university disciplinary proceeding. The court held that the improper burden shift onto the

⁷⁹ Lisa. L. Swem, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 359-360 (1987).

⁸⁰ *See Goss v. Lopez*, 419 U.S. 565, 572 (1975).

⁸¹ U.S. CONST. amend. XIV; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁸² *Goss*, 419 U.S. at 584.

⁸³ *Id.* at 583.

⁸⁴ *See Swem, supra* note 79, at 359-60.

⁸⁵ *Nash v. Auburn Univ.*, 812 F.2d 655, 667 (11th Cir. 1987).

⁸⁶ *Id.* at 667 (citing *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (1961)).

accused student imposed “an untenable standard upon Mr. Mock to prove that he forcible [*sic*] assaulted [the complainant]” rendering his expulsion from the school arbitrary and capricious.⁸⁷ In New York and California, the affirmative consent standard is statutorily mandated and failure to comply may result in cuts to funding for schools.⁸⁸ Concurrently, Title IX requires an impartial and equitable investigation into sexual assault allegations, and a failure to comply with *these* standards will result in an investigation by the Office of Civil Rights and potential cuts to federal funding.⁸⁹ As schools attempt to enforce affirmative consent standards to comply with the statutory mandate, the threat of unequal burden shifts, like the one in *Mock*, becomes increasingly plausible, and the disciplinary process becomes inequitable. Schools will thus be in violation of Title IX mandates, opening themselves up to scrutiny from the OCR and potential litigation from accused students over sanctions as a result of unfair processes.

PART III: TRENDS IN SEXUAL ASSAULT ON COLLEGE CAMPUSES AND DISCIPLINE

A. A Statistical Illustration of the Problem

Due to the novelty of affirmative consent statutes and the recent close scrutiny of university sexual assault policies, data is fairly limited on the statistical effect of affirmative consent statutes in New York and California and whether they are impacting sexual assault rates. Research consistently shows that one in five women report being sexually assaulted on college campuses, with experts believing these numbers to be an underestimation because sexual assault is vastly

⁸⁷ *Mock v. Univ. of Tenn.*, No. 14-1687-II *23 (Ch. Ct. of Davidson Cnty. Tenn, Aug. 4, 2015) (The court also cited the Chancellor’s failure to find that Ms. Morris did consent, intertwined the definition in the Student Code of Conduct of sexual assault and sexual misconduct, and made no distinction as to which acts occurred. The court noted that the Chancellor ignored the ALJ’s credibility determination on a crucial issue, which adversely impacted his findings and conclusions).

⁸⁸ CAL. EDUC. CODE § 67386 (2014); *see generally* N.Y. EDUC. LAW § 6441 (McKinney 2015).

⁸⁹ Ali, *supra* note 7 at 9, 16.

underreported.⁹⁰ Research also shows that at least 50 percent of campus sexual assaults are associated with alcohol use.⁹¹ Of sexual assaults involving alcohol use, between 81 percent and 97 percent involved both parties consuming alcohol.⁹² Furthermore, less than one-third of students found responsible for sexual assault are expelled from their colleges, while roughly 47 percent are suspended upon being found responsible.⁹³

A 2015 survey conducted by the risk-management group, United Educators (UE), provides compelling analysis of trends regarding perpetrators in sexual assault cases.⁹⁴ The UE report indicates that when sexual assaults are adjudicated, institutions impose their severest sanctions.⁹⁵ The study found that 43 percent of perpetrators deemed responsible were expelled.⁹⁶ Alternatively, 12 percent were suspended for more than a year and 25 percent of those perpetrators found responsible were suspended for less than a year.⁹⁷

The numbers currently available regarding sexual assaults on college campuses and the statistics referring to accused student punishments are useful in order to understand the problem of sexual assault on college campuses generally, but are not illustrative of trends on college campuses now that affirmative consent has been codified and applied as a statutory mandate. Both states with affirmative

⁹⁰ Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, at xvii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/AF4E-K6WL>]; Nick Anderson & Scott Clement, *College Sexual Assault: 1 in 5 Women Say They Were Violated*, THE WASHINGTON POST (June 12, 2014), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated> [<https://perma.cc/U3GB-M3YV>].

⁹¹ Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. STUD. ON ALCOHOL, SUPPL. 119 (Mar. 2002).

⁹² *Id.*

⁹³ Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [<https://perma.cc/45AW-BUMJ>].

⁹⁴ See EduRisk by United Educators, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 1 (2015), https://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual_assault_claim_study.pdf [<https://perma.cc/2H5K-MFJM>].

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 12.

⁹⁷ *Id.*

consent currently codified (New York and California) only implemented their legislation in 2015, and thus substantive data is not readily available on the mandates' impact on college campuses. However, the threats to accused students' due process rights as a result of the conflict between affirmative consent statutes and Title IX remain a compelling issue as schools continue to address the pervasive issue of sexual assault on their campuses.

PART IV: MOVING FROM HEARINGS TO INVESTIGATIONS TO MITIGATE POTENTIAL CONFLICT AND PROTECT DUE PROCESS RIGHTS

A. The Investigatory Model Formula

One way that schools may seek to protect their students' due process rights is by shifting their disciplinary setting from a hearing to an investigatory model. While current data is scarce on the number of schools that utilize a disciplinary hearing within their adjudication process, the Supreme Court has indicated in *Goss v. Lopez* that serious cases may require a more formal hearing.⁹⁸ A procedurally sound disciplinary hearing gives a student the opportunity to be heard by a disciplinary committee, and even a full-panel hearing in more serious cases.⁹⁹ The panel is screened to ensure impartiality and the student has the opportunity to present witnesses and question them.¹⁰⁰ Upon the conclusion of a hearing, the panel will make a finding of responsibility and recommend a sanction.¹⁰¹ The student then has the opportunity to appeal the panel's decision to a review board.¹⁰² While the hearing model is popular among colleges and universities, it is arguably inadequate for accused students to present their case in an affirmative consent jurisdiction while preserving their due process rights. The Supreme Court has firmly established that the only procedural rights a student is entitled in the university disciplinary proceeding are the right to notice of the charges against him or her and

⁹⁸ *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

⁹⁹ *See Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 258-59 (E.D. Pa. 2012).

¹⁰⁰ *See id.* at 259.

¹⁰¹ *Id.*

¹⁰² *See id.*

the opportunity to be heard in some kind of hearing.¹⁰³ With no further procedural guarantees, the student faces the panel alone, in a highly charged environment where he or she has been accused of sexual assault, without the ability to directly question his or her accuser due to Title IX mandates.¹⁰⁴ In an affirmative consent jurisdiction, there is an increased risk of unfair bias or burden shifting as schools attempt to comply with the statutory mandate affirmative consent requires while also comporting with the requirements of Title IX.

A more viable solution for protecting students' due process rights in an affirmative consent jurisdiction is to move towards an investigatory model, which eliminates the hearing component of the disciplinary process. Bridgewater State University in Massachusetts has employed this policy for the past two years.¹⁰⁵ In this model, once a complaint has been filed, the University assigns "the matter to an Administrative Investigator."¹⁰⁶ The Administrative Investigator provides notification and a copy of the complaint to the accused student.¹⁰⁷ The accused student then has the opportunity to "submit a written response" to the complaint.¹⁰⁸ "If the respondent does not respond, or otherwise fails to participate in the investigation, the Administrative Investigator will complete the investigation on the basis of [any] other information obtained."¹⁰⁹ The investigation must include:

An analysis of the allegations and defenses presented using the preponderance of the evidence standard; consideration of all relevant

¹⁰³ See *Goss*, 419 U.S. at 579; see also *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (1961).

¹⁰⁴ See *Ali*, *supra* note 7 at 12.

¹⁰⁵ See BRIDGEWATER STATE UNIVERSITY, THE OFFICE OF COMMUNITY STANDARDS, STUDENT CODE OF CONDUCT (2015-2016), <https://www.bridgew.edu/sites/default/files/Student-Code-of-Conduct-2015-4-30.pdf> [<https://perma.cc/2Z9W-F2JY>].

¹⁰⁶ See BRIDGEWATER STATE UNIVERSITY, THE OFFICE OF COMMUNITY STANDARDS, INVESTIGATION AND RESOLUTION PROCEDURES (March 15, 2015), <https://www.bridgew.edu/sites/default/files/Complaint%20Investigation%20and%20Resolution%20Procedures%20for%20BSU%202015%203%209.pdf> [<https://perma.cc/Y3CZ-WWYL>].

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (Author's note: the terms "respondent" and "accused student" are used interchangeably throughout this section and have the same meaning).

documents, including written statements and other materials presented by the parties; interviews of the parties and other individuals and/or witnesses; and/or reviewing certain documents or materials in the possession of either party that the Administrative Investigator has deemed relevant.¹¹⁰

The Administrative Investigator may also consider police reports generated by campus police or local law enforcement during the investigation.¹¹¹ “At the conclusion of the investigation, the Administrative Investigator shall prepare an Investigation Report for administrative review.”¹¹² The Investigation Report provides a comprehensive outline of the steps taken during the investigation, including findings of fact.¹¹³ The Report also “states whether a policy violation has occurred based on the preponderance of the evidence, explains the rationale for the violation determination, and, if applicable, recommends a sanction(s).”¹¹⁴

Following submission of the Investigative Report, a reviewing body then conducts an administrative review.¹¹⁵ The purpose of the administrative review is to determine whether the investigation was sufficient, defined as “prompt, fair, impartial and thorough.”¹¹⁶ If the reviewing body finds that the investigation does not meet these requirements, the Administrative Investigator will gather additional information.¹¹⁷ If the reviewing body determines that the investigation was sufficient, the reviewing body then considers whether the recommended sanction is appropriate.¹¹⁸ Once the administrative review is complete, the accused student receives notification of the reviewing body’s findings, including any sanctions imposed, and “a written Notice of Outcome” is issued to the complainant.¹¹⁹

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 6.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

B. Good Policy: How the Investigatory Model Preserves Due Process Rights

The investigatory model, as outlined in Bridgewater State University's Student Code of Conduct is arguably a much sounder method of dealing with sexual assault allegations on college campuses than the disciplinary model. This is especially true in affirmative consent jurisdictions where the potential inequity created between affirmative consent and Title IX fosters an increased risk in due process violations for accused students. One student conduct administrator from a Massachusetts university recently proposed a total revision of the school's disciplinary proceedings, shifting from a conduct hearing process to an investigatory process.¹²⁰ The proposal outlines several compelling reasons why the investigatory model is superior to the conduct hearing model. Notably, the introductory overview states, "[n]ew information is coming to us on a daily basis from various governmental agencies and it is confusing and difficult to incorporate sometimes contradictory principles and expectations into our student conduct processes."¹²¹ Further, the proposal emphasizes the desire to move away from legalistic and adversarial processes (i.e. a hearing), with the hopes of creating a process that focuses more on restorative justice.¹²²

The proposal goes on to illustrate positive policy and rationale reasons for making the change to an investigatory model. These include: limiting trauma for the victim by requiring him or her to tell their story ONCE to a qualified investigator who is trained to ask questions and make assessments based on a preponderance of the evidence standard; the complainant, accused student and witnesses are more likely to be open with an investigator in a one-on-one setting, making the interaction much less adversarial than a hearing; and questioning is likely to be more developmental with a trained investigator, rather than a panel of board members with little experience in dealing with sexual assault cases.¹²³

¹²⁰ See Memorandum, Proposal: Revision of Student Conduct Policies and Procedures (Dec. 19, 2014) (on file with author).

¹²¹ *Id.* (referring to specific changes in the field such as the issuance of the Dear Colleague Letter, the reauthorization of the Violence Against Women Act, and amendments to the Clery Act).

¹²² See *id.*

¹²³ *Id.*

Based on the policy reasons outlined in the proposal, the investigatory model offers a more relaxed setting that looks less like a formal legal proceeding. The complainant and the accused student are interviewed separately, eliminating contention that can undoubtedly materialize in a formal hearing. There will likely be less risk of imposing unfair presumptions or burdens of proof on the parties, as the investigator is free to gather facts and assess them independently of each other, culminating in a report that represents an objective rendering of the circumstances of the case. Therefore, eliminating hearings and instating an investigatory model may mitigate confusion for affirmative consent schools and allow them to facilitate compliance with Title IX requirements of impartial and equitable treatment of both parties.

Colleges and universities may be reluctant to move away from the conduct hearing model. The SUNY system continues to use the conduct hearing model, even in the wake of the implementation of the affirmative consent statute.¹²⁴ SUNY administrators considered moving from conduct hearings to an investigatory model, ultimately deciding to continue holding hearings in order to ensure due process for all involved students.¹²⁵ However, it is important to emphasize that the law requires no particular form of hearing.¹²⁶ Further,

There is no general requirement that procedural due process in student disciplinary cases provide for legal representations, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence.¹²⁷

It is therefore important for colleges and universities to remember that simply providing some kind of notice and hearing does not violate a student's due process rights.¹²⁸ Proper notice and the opportunity to be heard in an informal setting, such as a meeting with an investigator

¹²⁴ Doe, *supra* note 30.

¹²⁵ *Id.*

¹²⁶ Edward N. Stoner & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 40 (2004).

¹²⁷ *Id.* at 13-14.

¹²⁸ *Id.* at 13 (citing *Goss v. Lopez*, 419 U.S. 565, 582-84 (1975)).

under the investigatory model is sufficient to meet due process standards, according to the Supreme Court.¹²⁹

CONCLUSION

The pervasive problem of sexual assault on college campuses has resulted in nationwide media attention and a call to action from legislators, administrators and even the President of the United States. Affirmative consent statutes like those codified into law in New York and California are making their way through numerous state legislatures. However, affirmative consent statutes must co-exist with Title IX mandates seeking to eliminate discrimination on college campuses by promoting prompt, impartial and equitable response to sex discrimination, including sexual assault. Due to ambiguous affirmative consent statutes and the potential for misapplication of the standard in a formal hearing setting, affirmative consent risks creating an inequitable environment, which in turn creates a conflict with Title IX's requirements of equitable treatment. As a result, accused students face potential violations to their due process rights in a formal conduct hearing setting.

Schools can mitigate this risk by moving away from the conduct hearing model and implementing an investigatory model in order to clarify the application of affirmative consent while simultaneously complying with Title IX requirements of equitable treatment for both parties. The investigatory model maintains compliance with students' due process rights and allows a trained investigator to make an objective determination of the facts in a less contentious setting for all parties involved. While the conduct hearing model has been the traditional formula for institutions of higher learning for many years, sexual assaults on college campuses and the legislature's response in the form of affirmative consent statutes present new challenges for colleges and universities. By developing a more comprehensive system using the investigatory model, schools will be able to protect the rights of both the accused student and the complainant, ensuring safer campuses and a united front against the scourge of sexual assault in institutions of higher learning.

¹²⁹ See *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 155 (5th Cir. 1961); see also *Goss v. Lopez*, 419 U.S. 565, 579 (1975).